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No. 00-431

In the

Supreme Court of the United States

KINROSS COPPER CORPORATION,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

ERIC GRANT
Counsel of Record
JAMES S. BURLING
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae
Pacific Legal Foundation

QUESTIONS PRESENTED

1. When an unpatented mining right protected by federal law is abrogated by a state regulation prohibiting discharge of nonpolluting mine waters, does a taking occur under the Fifth Amendment's Takings Clause?

2. Is a state regulation that prohibits the discharge of nonpolluting mine waters, and thus prevents an unpatented mining claim on federal lands from being developed, preempted by federal law?

3. Does takings jurisprudence require a property owner to show that it has a property interest in the very thing the state seeks to regulate, rather than merely showing that the effect of the regulation as applied to the petitioner denies it all economic use of a federally recognized property right?

4. Can state court, under the guise of stating that the holder of an unpatented mining claim never had the right to appropriate water for the mine and, therefore, never had the right to discharge it as a part of its property right, thus avoid a "taking," when at common law it was not a nuisance for a miner to discharge nonpolluting mine waters into streams.

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INTEREST OF AMICUS CURIAE

For 26 years, amicus Pacific Legal Foundation (PLF) has been litigating in support of the right of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on two occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Suitum v. Tahoe Regional Planning Agency*, 502 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF attorneys will soon appear before this Court yet again on behalf of a property owner who, like petitioner here, is asserting a regulatory takings claim against a state government. *See Palazzolo v. Rhode Island*, No. 99-2047 (cert. granted on Oct. 10, 2000). Finally, PLF has participated as amicus curiae in virtually every major real property takings case heard by this Court in the past two decades.[1]

STATEMENT OF THE CASE

The relevant facts in this case are simple. In 1975, Amoco Minerals Company staked unpatented mining claims on federal land in the Willamette National Forest in Oregon. Two years later, a state agency issued the "Three Basin Rule," which prohibits "any new or increased waste[water] discharges" into the Clackamas, McKenzie, or North Santiam River Subbasins. In 1992, having leased the mining claims from Amoco, petitioner submitted to the Oregon Department of Environmental Quality an application to discharge groundwater into the latter subbasin as part of a plan for operating a copper mining project. More

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

specifically, the application sought a permit under the National Pollutant Discharge Elimination System (NPDES), the system established by the federal Clean Water Act and implementing state laws. *See* Petition Appendix (Pet. App.) at A–3 to –6.

The Department investigated the water quality aspects of petitioner's mining plan and expressly found that any discharge of water from petitioner's mine "would be well below the *most stringent* water quality standards, chronic toxicity. Therefore, water quality standards would not be violated and beneficial uses would be protected." *Id.* at I–6 (emphasis added). That is, petitioner proposed to discharge from its copper mine only water that met most stringent standards under federal and state clean water laws. Nevertheless, the Department denied petitioner's NPDES permit application solely "on the ground that the Three Basin Rule prohibits *any* new [water] discharges into the North Santiam River Subbasin." *Id.* at A–6.

After exhausting its administrative remedies, petitioner brought the instant inverse condemnation action in the Oregon courts, alleging that the denial of its permit application worked a compensable taking of private property under the federal and state constitutions, invoking this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Petitioner also argued in the state courts that the Three Basin Rule, as applied to petitioner's mining operations, was preempted by federal mining law. In the decision under review, the Oregon Court of Appeals rejected both arguments.

SUMMARY OF ARGUMENT

Certiorari is warranted on at least two grounds. First, the Oregon court correctly found that the application of the Three Basin Rule to petitioner's proposed copper mining operation would deny all economically viable use of petitioner's mining property, so as to invoke *Lucas*'s categorical rule that total regulatory takings must be compensated. But the court incorrectly applied *Lucas*'s "background principles" exception in requiring

petitioner to prove that it had a "right" to discharge clean water into a public waterway. *Lucas* itself makes clear that it is the government, not the property owner, that bears the burden to establish the existence of background principles sufficient to overcome the categorical rule, and several lower courts are in conflict with the court below on just that point. In the present case, the government did not even attempt to satisfy its burden, and had it attempted, it would surely have failed. Nothing in the common law of property or nuisance even suggests that a property owner could be enjoined from discharging clean water into a public waterway.

Second, the application of the Three Basin Rule to petitioner's proposed operations effectively prohibited petitioner from working its federal mining claims on federal land. This Court has implicitly held that any state-law prohibition against mining on federal lands is preempted by federal mining laws. In rejecting the argument that the Three Basin Rule as applied to petitioner was so preempted, the Oregon court contributed to a split on this issue among the lower courts.

ARGUMENT

I

THE OREGON COURT FUNDAMENTALLY MISAPPLIED THE "BACKGROUND PRINCIPLES" EXCEPTION OF *LUCAS*, EXACERBATING A CONFLICT IN THE LOWER COURTS

As set forth above, petitioner submitted an "application for an NPDES permit as a precondition to conducting a copper mining operation." Pet. App. at A–14. Solely on the basis of its Three Basin Rule, the Oregon Department of Environmental Quality denied the application. *See id.* at A–6. The parties stipulated—and the court below accepted—that "the effect of the denial deprives [petitioner's] unpatented mining claims of all of their economic value." *Id.* at A–14. Consequently, the court below recognized that petitioner had properly invoked the

rule that a regulatory takings claim may be maintained "against a government agency that has taken action that has deprived the owner of 'all economically beneficial use' of the property." *Id.* at A–12 (citing *Lucas*).

Nonetheless, the Oregon court dismissed petitioner's regulatory takings claim. In so doing, it relied on the "background principles" exception enunciated in *Lucas*. That exception is an exception to the otherwise "categorical rule that total regulatory takings must be compensated." 505 U.S. at 1026. *Lucas* gave the government but a single escape from this obligation: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027. In other words, the government can avoid paying compensation for land-use limitations that otherwise amount to categorical takings only if those limitations on use "inhere in the title itself, in the restrictions that *background principles* of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029 (emphasis added).

In applying *Lucas*'s background principles exception to the present case, the Oregon court did ***not*** require the government to show that petitioner's discharge of water into a river would constitute a nuisance or other conduct that was "*always* unlawful" under state law. *Lucas*, 505 U.S. at 1030 (emphasis in original). Nor did the lower court consider in any fashion whatever "the degree of harm to public lands and resources, or adjacent private property, posed by [petitioner's] proposed activities, the social value of the [petitioner's] activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided." *Id.* at 1030-31 (citations omitted). No, the lower court instead required *petitioner* to "show that the denial of its NPDES permit application deprived it of a property right"; in other words, petitioner "must

show that it had *a right to discharge its wastewater into a river of the state*." Pet. App. at A–15 (emphasis added).

Ultimately, the Oregon Court of Appeals concluded that petitioner "never possessed" such a right. *Id.* at A–28. As the court explained, when petitioner's "unpatented mining claims came into existence [in 1976], no water rights"—i.e., rights to *appropriate* water—"were conferred with them." *Id.* at A–26. Thus, reasoned the court, if petitioner "has a private property right to discharge wastewater into the publicly owned waters of the state, the right must have come into existence separately after compliance with state law regarding the creation and recognition of state water rights." *Id.* But "[t]here is no evidence in the record . . . that [petitioner] has obtained a water rights permit or certificate after complying with the requirements of the statutory permit process." *Id.* Therefore, stated the court, "in denying [petitioner's] application for a permit to conduct that [discharge of unpolluted water], the state has not effected a taking of private property." *Id.* at A–28.

In so applying the background principles exception enunciated in *Lucas*, the lower court gravely erred. As explained below, the Oregon court improperly excused the government from its burden to establish the existence of a background principle sufficient to overcome the government's otherwise categorical duty to pay compensation for confiscatory regulations of private property.

A. The Government, Not the Property Owner, Has the Burden to Establish the Existence of Background Principles Under *Lucas*

When it is established—as it has been here—that a regulation has deprived an owner of all economically viable use of his property, who bears the burden of proof as to whether that deprivation is justified by any background principles of state property and nuisance law? As set forth below, we submit that *Lucas* makes it plain that the government bears this burden.

Recall that the "categorical rule" is that "total regulatory takings must be compensated." *Lucas*, 505 U.S. at 1026. Any "departure" from this categorical rule requires "justification," *id.*, and the only valid justification is that the regulation "do[es] no more than duplicate the result that could have been achieved in the courts" by adjacent landowners or by the State under the law of nuisance, *id.* at 1029. Just who has to show that other property owners or the state could have achieved this result? *Lucas* did not leave us guessing. In concluding that the background principles/nuisance issue "is one of state law to be dealt with on remand," the Court explicitly set forth what must be proved and, more importantly here, who must prove it: "We emphasize that to win its case, . . . *South Carolina* must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found." *Id.* at 1031 (emphasis added). That is, *the government* has the burden to come forward with background principles that would prohibit the use desired by the property owner.

In contrast to the court below, several lower courts have faithfully applied the foregoing framework for resolving regulatory takings claims that implicate the background principles exception. Foremost among these is the United States Court of Appeals for the Federal Circuit. In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), for example, the government defended its denial of a permit to fill wetlands—a denial that deprived the plaintiff of all economically viable use of its property—on the ground (among others) that "allowing the fill would constitute a nuisance." *Id.* at 1182. The Federal Circuit placed the burden of proof as to this issue squarely on the government: "The trial court concluded that the Government had failed to carry its burden of showing that [nuisance] law could have been invoked to prevent the fill. Our review of the record leads us to the same conclusion." *Id.* at 1183. Thus, the court of appeals affirmed an award of compensation for a

taking of the plaintiff's property. Earlier this year, the Federal Circuit reaffirmed that *Lucas* requires the government, not the property owner, to identify the relevant background principles: "it is clear that in order to assert a defense under the navigational servitude, the Government must show that the regulatory imposition was for a purpose related to navigation; absent such a showing, it will have failed to 'identify background principles . . . that prohibit the uses [the landowner] now intends.'" *Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000) (quoting *Lucas*, 505 U.S. at 1031).

Also in contrast to their Oregon counterparts, the courts of Washington state have correctly applied *Lucas*'s background principles exception. Thus, in *Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993), *cert. denied*, 510 U.S. 1176 (1994), the Washington Supreme Court undertook a comprehensive review of takings law and procedure in light of the then-recent decision in *Lucas*. *Guimont* held that, at the outset of a regulatory takings case, "the landowner must have the opportunity to prove . . . that the regulation . . . denies all economically viable use of the property." *Id.* at 10. If the landowner proves this denial, "the State will then have the opportunity to rebut this claim by identifying common law principles of state nuisance and property law that prohibit the uses the landowner now intends in the circumstances in which the property is presently found." *Id.* Accordingly, "[i]f the landowner proves a 'total taking' . . . has occurred, *and if the State fails to rebut that claim*, the owner is entitled to categorical treatment under *Lucas*," that is, payment of compensation. *Id.* (emphasis added); *accord, e.g., Manufactured Housing Communities v. State*, 951 P.2d 1142, 1148 (Wash. Ct. App. 1998) (holding that an owner whose property is subjected to a total regulatory taking is entitled to compensation "unless the State provides rebuttal evidence showing that the use violates nuisance or property laws"); *see also City of St. Petersburg v. Bowen*, 675 So. 2d 626, 630 (Fla. Dist. Ct. App. 1996) ("In order to prevail on its affirmative defense of

the nuisance exception [under *Lucas*], the City has the burden of proving that . . . ."), *cert. denied*, 520 U.S. 1110 (1997).

Obviously, the decision below cannot be reconciled with *Lucas* or the other decisions cited above. Whereas *Lucas* held that "*South Carolina* must identify background principles," 505 U.S. at 1031 (emphasis added), the decision below stated that "*plaintiff* [petitioner] must show that the denial of its NPDES permit application deprived it of a property right," Pet. App. at A–15 (emphasis added). Whereas the Federal Circuit placed on the government the "burden of showing that [nuisance] law could have been invoked to prevent" the property owner's proposed activity, *Loveladies Harbor*, 28 F.3d at 1183, the court below placed on petitioner the burden of "show[ing] that it had a right" to engage in the proposed activity, Pet. App. at A–15. Whereas the Washington courts award compensation for total regulatory takings "unless the State provides rebuttal evidence showing that the [proposed] use violates nuisance or property laws," *Manufactured Housing*, 951 P.2d at 1148, the Oregon courts deny compensation for total regulatory takings even if there is "no evidence in the record" as to whether the proposed use is lawful or not, Pet. App. at A–26.

B. The Government Did Not Even Attempt to Satisfy Its Burden in the Present Case, Nor Could It

Under *Lucas*, Oregon had the burden to "identify background principles of nuisance and property law that prohibit the uses [petitioner] now intends in the circumstances in which the property is presently found." *Id.* at 1031. Specifically, the state had to show that its Three Basin Rule did "no more than duplicate the result that could have been achieved in the courts . . . under the State's law of . . . nuisance," *id.* at 1029, which is to say it had to show that the discharge of clean water into a public waterway was "*always* unlawful" under nuisance law, *id.* at 1030 (emphasis in original). So far as is revealed by the lower court's opinion, the state did not even attempt to make

this showing. Likewise, the court itself did not even intimate that petitioner's proposed drainage was in any way unlawful.[2]

It may be worth asking whether the state could have satisfied its burden had the state courts required it to do so. Could the state have obtained an injunction against petitioner's discharge of clean water into a public waterway? Under generally applicable background principles of property and nuisance law, the answer is *no*.[3]

In *North Dakota v. Minnesota*, 263 U.S. 365, 372 (1923), Chief Justice Taft wrote for a unanimous Court: "One owning land on a watercourse may by ditches and drains turn into it all the surface water that would naturally drain there, but he may not thus discharge into the watercourse more water than it has capacity to carry, and thus burden his lower neighbor with more than is reasonable." In support of this statement, Chief Justice Taft cited several state-court decisions, the most pertinent of which is *McCormick v. Horan*, 81 N.Y. 86 (1880). There, the highest court of New York opined:

> The interests of society are promoted by the cultivation and improvement of the soil, *the working of mines*, and by other industries connected with the use of land, and the rule of law does not prevent the use of water-courses for artificial drainage, *although the*

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[2] Except, of course, to point out that petitioner had not obtained a permit under the "statutory permit process," that is, the process of which the Three Basin Rule is a part. Pet. App. at A–26. It should be obvious that a use of property is not demonstrated to be "*always* unlawful" merely because that use violates the very regulation that is under constitutional attack.

[3] Of course, the law of any particular state might depart from general common-law principles, but the state court did not cite, nor are we independently aware of, any Oregon authorities that depart from the authorities discussed in the text.

> *volume of the stream is thereby somewhat enlarged*, and the water is discharged at a different time or manner from what it would be if the land was kept in a state of nature, provided no material injury is occasioned to other riparian owners.

Id. at 90 (emphasis added). Other state courts are in accord.[4]

The rule that clearly emerges from these decisions is that discharging water by artificial means for industrial purposes,

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[4] *See, e.g., Jackman v. Arlington Mills*, 137 Mass. 277, 283 (1884) (holding that an owner has the right to collect and discharge water into "the natural outlet of the waters thus collected, even although, by this artificial arrangement, the flow of the waters is accelerated, and the volume at times is increased, provided that this is done in the reasonable use of his own land, and that the discharge is not beyond the natural capacity of the watercourse, and the land of a riparian owner is not thereby overflowed, and materially injured"); *Tillotson v. Smith*, 32 N.H. 90, 95 (1855) ("In short, if any person, above or below, shall make any change in the natural flow of a stream, to the material injury of the owner situate upon it, . . . he is liable for the damage he may occasion."); *Mayor of Baltimore v. Appold*, 42 Md. 442, 456-57 (1875) ("Of course we are not to be understood as meaning there can be no diminution or increase of the flow whatever, for that would be to deny any valuable use of it. . . . The limits which separate the lawful from the unlawful use of a stream, it may be difficult to define. . . . It is entirely a question of degree, the true test being whether the use is of such a character as to affect materially the equally beneficial use of the stream by others."); *Baldwin v. Ohio Township*, 78 P. 424, 426 (Kan. 1904) ("The owner of land has a right to discharge the natural drainage of his land, and the surface-water accumulating thereon, into a watercourse, whereby it becomes a part thereof, and in so doing he may change or concentrate its flow in artificial channels, thus accelerating the flow and increasing the volume of water in the stream, provided its natural capacity is not exceeded . . . .").

All of these decisions were cited with approval by the Court in *North Dakota v. Minnesota*. *See* 263 U.S. at 372.

including mining, is a reasonable use of land. So long as the water discharged does not, by virtue either of its quality or its quantity, cause injury to another, the law will not interfere with the discharge. In the present case, there is no suggestion that anyone, including the state, would suffer any injury from petitioner's proposed discharges of clean water. Indeed, the state Department of Environmental Quality specifically found that "water quality standards would not be violated and beneficial uses would be protected." Pet. App. at I–6. In these circumstances, the state cannot show that its Three Basin Rule did "no more than duplicate the result that could have been achieved in the courts . . . under the State's law of . . . nuisance." *Lucas*, 505 U.S. at 1029.

For all these reasons, the lower court fundamentally misapplied the background principles exception of *Lucas*. In so doing, the court exacerbated a conflict in the lower courts, a conflict that only this Court can resolve.

II

THE OREGON COURTS ALSO CONTRIBUTED TO A SPLIT IN THE LOWER COURTS AS TO WHETHER STATE PROHIBITIONS AGAINST MINING AND OTHER ACTIVITIES ON FEDERAL LANDS ARE PREEMPTED BY FEDERAL LAW

As applied in this case, the Three Basin Rule categorically foreclosed petitioner from obtaining an NPDES discharge permit for its proposed copper mine. Accordingly, the rule had the undisputed effect of prohibiting petitioner from developing its federal mining claims. *See* Pet. App. at I–7 (stipulation of the parties that without the discharge permit, petitioner "would not be able to develop and operate the mine"). In the state courts, petitioner argued that the Three Basin Rule "as applied in this case is preempted by federal mining and land use law." Pet. App. at G–5 (petition for review to Oregon Supreme Court). In rejecting petitioner's preemption argument, the Oregon courts

contributed to a split in the lower courts as to whether state or local prohibitions against mining or other activities on federal lands are preempted by state law.[5]

A. The Law of Federal Preemption with Respect to Mining Activity on Federal Lands

The standards governing federal preemption of state law are well established, though not well understood in some contexts by some courts. In *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), this Court wrote:

> [E]ven where Congress has not entirely displaced state regulation in a particular field, state law is preempted when it actually conflicts with federal law. Such a conflict will be found when it is impossible to comply with both state and federal law, . . . or *where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.*

Id. at 300 (citations and internal quotation marks omitted and emphasis added). The present case implicates the latter kind of preemption.

What are the "full purposes and objectives of Congress" with respect to mining on federal lands? The answer is quite simple: it is the unambiguous intent of Congress to encourage and promote mining activities on federal land. *See Deffeback v. Hawke*, 115 U.S. 392, 401 (1885) (describing the 1872 mining law as an act "to promote the development of the mining

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[5] The issue of preemption is also relevant to petitioner's regulatory takings claim. It is elementary that a regulation effects a taking of private property for public use if it fails to "substantially advance a *legitimate* state interest." *E.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (emphasis added). Because a state regulation that is preempted by federal law is invalid, such a regulation can never advance a *legitimate* state interest.

resources of the United States"); *United States v. Coleman*, 390 U.S. 599, 602 (1968) ("Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense." (footnote omitted)); *Brubaker v. Board of County Commissioners*, 652 P.2d 1050, 1056 (Colo. 1982) (observing that "underlying purpose of the mining laws is to encourage exploration for and development of mineral resources on public lands").

Congressional statements of policy subsequent to the 1872 mining law confirm that Congress continues to support and encourage the development of mineral resources on federal lands. For example, in the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a, Congress declared that "it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries." This goal was reaffirmed in the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(12), and in the National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. §§ 1601, 1602, 1605.

This Court addressed federal preemption with respect to mining in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), which held that the Coastal Commission could impose its regulatory permitting requirement upon the operation of Granite Rock's unpatented federal mining claims within the Las Padres National Forest. Importantly, this Court observed that federal statutes and regulations *contemplated and respected* the existence of state environmental regulations. *See id.* at 583-84. But the Court did so only on the explicit understanding that such regulation did not *prohibit* the development of the mining claims and that such regulation was not designed

to undercut the decisionmaking authority of the United States Forest Service. *See id.* at 586.

Indeed, this Court was explicit and emphatic in its understanding that the California Coastal Commission did not seek to *ban* the mining activity:

> In the present case, the Coastal Commission has consistently maintained that it does not seek to prohibit mining of the unpatented claim on national forest land. See 768 F. 2d, at 1080 ("The Coastal Commission also argues that the Mining Act does not preempt state environmental regulation of federal land *unless the regulation prohibits mining altogether* . . .") (emphasis supplied).

480 U.S. at 586. This passage is followed by an extensive collection of record cites showing that the Coastal Commission eschewed the authority to prohibit mining activity. This fact is important because *Granite Rock* distinguished mere permitting and other environmental requirements from those that sought to prohibit certain uses or otherwise dictate land use choices on federal lands: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* at 587.

B. The Lower Courts Are Split as to Whether State and Local Governments Can Prohibit Mining and Other Activities on Federal Lands

Notwithstanding *Granite Rock* and despite the clear intent of Congress to *encourage* mining on certain federal lands, the lower courts are in conflict as to whether state and local governments can prohibit such mining without running afoul of the preemption doctrine.

The most telling case is *South Dakota Mining Association v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998). There, the voters of Lawrence County, South Dakota, adopted an ordinance that prohibited all new or expanded surface metal mining on 40,000 acres of the county. *Id.* at 1007. After noting that surface metal mining is the only viable method of extracting gold and silver deposits in this area, the Eighth Circuit concluded that the ordinance effectively constituted a "per se ban on all new or amended permits for surface metal mining." *Id.* at 1011. After reciting the congressional intent behind the federal mining laws, the court concluded:

> The ordinance's de facto ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act. . . . A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. The ordinance is prohibitory, not regulatory, in its fundamental character. The district court correctly ruled that the ordinance was preempted.

Id.

The Colorado Supreme Court reached a similar result in *Brubaker v. Board of County Commissioners*, ruling that the Board of El Paso County was preempted from refusing to grant a special use permit for oil drilling on federal land because the operations had already been approved by the federal government. In the face of assertions by the county that it was merely conditioning development on compliance with reasonable legislative standards, the court found preemption because the board had applied its local zoning ordinances to prohibit a federally authorized use of federal property. *See* 652 P.2d at 1054-56.

Boundary Backpackers v. Boundary County, 913 P.2d 1141 (Idaho 1996), yielded a similar result in a non-minerals context. The Board of Commissioners of Boundary County had adopted an ordinance purporting to give the county veto power over federal agency land management decisions that related to, among other laws, the Clean Water Act, Endangered Species Act, Wild and Scenic Rivers Act, and Wilderness Act of 1964. *See id.* at 1144-45. Relying on *Granite Rock*, the Idaho Supreme Court had no difficulty in concluding that the county's prohibitory regulation was preempted by federal law. *See id.* at 1146-48.

In conflict with these opinions are the opinion below and *Le Faivre v. Environmental Quality Council*, 735 P.2d 428 (Wyo. 1987), both of which involved prohibitions on the development of federal mining claims. In *Le Faivre*, the court first upheld a prohibition of the development of a federal mining claim located on a scenic natural rock formation because reclamation was impossible once "the area is destroyed by cutting up and hauling away the . . . rock formation." *Id.* at 434.[6] The court found that the prohibition was not preempted because federal law contemplated concurrent state regulation of the mining claims. *Id.* Despite the court's assertion that its decision was "consistent" with *Granite Rock*, *see* 735 P.2d at 434 n.3, it clearly was not, given the prohibitory nature of the state regulation.

These various decisions about federal preemption cannot be reconciled. Only this Court can resolve this conflict.

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[6] Interestingly, in *Granite Rock*, the objection to the mining operation was that it would mine a scenic mountain. *See Granite Rock Co. v. California Coastal Commission*, 590 F. Supp. 1361, 1366 (N.D. Cal. 1984). But of course, the Coastal Commission never prohibited the operation or denied a permit. *See* 480 U.S. at 586.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

ERIC GRANT
Counsel of Record
JAMES S. BURLING
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae
Pacific Legal Foundation